No. 3199

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY (a corporation), claimant of the American Steam Tug "Fearless", her boilers, engines, tackle, apparel and furniture,

Appellant,

vs.

A. H. BULL & COMPANY, INC. (a corporation),

Appellee.

REPLY BRIEF FOR APPELLANT.

WILLIAM DENMAN,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant.

PERNAU-WALSH PRINTING CO.

Index.

Table of Cases Cited.

No. 3199

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY (a corporation), claimant of the American Steam Tug "Fearless", her boilers, engines, tackle, apparel and furniture,

Appellant,

vs.

A. H. BULL & COMPANY, INC. (a corporation),

Appellee.

REPLY BRIEF FOR APPELLANT.

I.

The "Edith's" Captain Let Her Drift From Off Pier 42 Almost to Pier 32 in Plain View of Her Danger Without Dropping His Anchors or Attempting to Use His Engines—and Herein of the Relevancy of the Non-Production of Witnesses and Logs.

The striking fact in this case, however one approaches its consideration, is that the "Edith" in broad daylight and clear weather, with her captain on the bridge, her engines uninjured and in full command and her heavy anchors ready for instant dropping, collided with the

end of a pier after drifting for eighteen hundred feet towards this obvious danger, without attempting to turn over her engines or drop her anchors.

The captain of the "Edith" explains this apparently unpardonable neglect by asserting (a) that he did not use his engines till at the very last moment, because he erroneously believed (and without consulting his chief engineer) that the end of a hawser dropped by the tug had caught in his propeller and disabled it; and (b) that he did not drop his anchors because, although he did not advise the tug of his erroneous belief that his propeller would not turn, he left it "up to the tug" (but without telling her) to save the vessel by some other method than dropping his anchors.

The above facts clearly appear from the depositions of the captain and mate of the "Edith", the only witnesses offered by the libelant, from the dozen persons on the "Edith" who had knowledge which bore on the mishap.

Obviously, the paramount question then is what was the interval of time and the distance drifted between the fouling of the hawser in the propeller when the "Edith's" engine stopped and the collision with the pier-head. If we could tell the minute when the "Edith's" engine stopped and the minute when they started up again just before the vessel crashed into the pier, we can determine the most important element in fixing the "Edith's" captain's causal responsibility, that is, his responsibility for not dropping his anchors and for not trying his engines to see if, in fact, the fouled hawser end had done any hurt to them, and for

not telling the tug's captain, if he intended to give up the control to him, that he believed the propeller unworkable.

If the "Edith's" captain did not have a reasonable time *after* the hawser caught in the propeller to determine whether she was disabled and to shift the command and give the information to the tug's captain, then he may find some excuse. If he did have abundant time after he was told of the fouling of the hawser to do these things, he is clearly at fault. On this, the "Edith" had the burden of proof, for it must show the causal chain leading to her injury.

The analysis of the evidence (and the absence of it) on this essential point is not difficult. It was the easiest circumstance to prove in the libelant's case. The captain and the mate agree and it is uncontradicted that the line was fouled and the "Edith's" captain knew it before her propeller, which was then going ahead, was stopped. The captain testifies:

> "Q. When you started slow ahead on your engines what happened?
>
> A. Shortly afterward the mate sang out and said the line was cast off the boat, and before the engine stopped it was in the wheel.
>
> Q. That is, it fouled the propeller?
>
> A. Fouled the propeller.
>
> Q. Did you give any signal to the tugboat to cast off her line? A. No, I did not.
>
> (Mr. McGrann). Q. May I understand that answer—you say the mate said this?
>
> A. The second.
>
> Q. Is that what the mate said or is that the statement of the captain, is the last part what the mate said or is that what you said?
>
> A. That is what I got about it from him.

(Mr. Farwell). Q. What report did the mate make to you?

A. That the line was in the wheel.

* * * * * * *

Q. At that time your engines were going ahead?

A. Had been going ahead, they were stopped when the line got into the wheel."

(Apostles pp. 36, 37.)

Q. Did you say that the mate had hauled in the line?

A. Not then, when the engines were stopped, *but before we took time to stop them* the mate was hauling the line in, and it was afoul of the wheel."

(Apostles p. 60.)

The second mate says:

"Q. What did you do when you saw the 'Fearless' had let go the stern-line?

A. Gave the signal to the captain to stop the engines.

Q. Did the captain stop the engines?

A. Yes, sir.

Q. Was it necessary to stop the engines?

A. Yes, because the line was foul."

(Apostles p. 84.)

Now the "Edith's" mate and tug's captain agree that the tug dropped the tow line when the "Edith" was off pier 44, and the captain tells us that he stopped his engines off pier 42.

"Q. Do you know what pier the ship was off when the tug cast off the tow-line?

(Hansen). A. She was off 44 then."

(Apostles p. 101.)

"Q. In which direction did you pull her?

(Sandstrom). A. Well, right out of the slip.

Q. Straight out into the bay? A. Yes.

Q. Did you receive any assistance from the steamer by her engines?

A. The steamer was backing at the same time.

Q. Now, you subsequently let go from the steamer's hawser, did you, afterwards?

A. I let go after the steamer stopped.

Q. Now, about how far off the end of pier 44 were you at the time that the hawser was finally let go?

A. Well, in the neighborhood of 700 feet; it might have been a little less or it might have been a little more.

Q. What pier were you about opposite at the time that you let go?

A. Well, just about opposite 44.

Q. Opposite 44? A. Yes."

(Apostles pp, 287, 288.)

"Q. Had you drifted down along the piers?

(McDonald). A. Yes.

Q. Opposite what pier were you when you stopped your engines?

(McDonald). A. Off pier 42 I believe."

(Apostles p. 38.)

He did not start them till within 150 to 200 feet from pier 32 (Apostles p. 67).

In the absence of all other testimony, we would be compelled to accept this testimony of the "Edith's" captain as controlling on the question as to when he knew the line had fouled his propeller. It was his ship, and he would not be too liberal against his own interest, in his opinion as to the amount of time and distance he was to travel, in which he could have taken measures to protect his vessel from suffering injury. On later cross-examination he stuck to this statement, although all

the piers passed between 42 and 32 were specifically enumerated as measuring his drift after stopping his propeller, because he thought it fouled by the line (Apostles 68).

But the absence of the other testimony from the "Edith" is most significant. If the stopping of the engines subsequent to the fouling of the propeller had not occurred this long time before their starting again at 150 feet from pier 32,—too late to save her from colliding,—the engineer's testimony, refreshed from the engine room logs, would have shown the exact truth.

Every person who has any knowledge of steamship operation knows that the engineer sets down in his log the times of the stoppings, startings and changings of speed and direction of his engines, and he did so in this case (48). He would also note the time of the crashing into the dock.

Captain McGrann, one of the best of the maritime lawyers at the New York bar, cross-examined the "Edith's" captain. On his direct examination the captain had testified to the above facts as to his knowledge of the supposed fouling before the engines had stopped and his long drift after this before he tried to see whether they were in fact fouled. Mr. McGrann's cross-examination was at once directed to this point and he located the assistant engineer and the vessel's engine room logs as still on the "Edith" which was to arrive in New York ten days from that date, March 20. The cross-examination and demand for the logs was as follows:

> "Q. How about in the engine-room, don't they keep a record in the engine-room?

A. They keep a record in the engine-room.

Q. Do you know whether they kept any on this occasion? A. I think so.

Q. Where is the 'Edith' now? A. Porto Rico.

Q. Do you trade between Porto Rico and the east coast?

A. And New York, yes, at present.

Q. When is she due here again, do you know?

A. In about two weeks.

Q. Is the chief engineer still on board the 'Edith'? A. No, he is not there.

Q. Are any of the officers, to your knowledge, on the 'Edith' that were on her then?

A. Not any, to my knowledge. Yes—I think the first assistant.

Q. The log-books remained on the vessel, didn't they? A. I imagine they did.

Mr. McGrann. I call for the production of the log-books bearing on this occurrence."

(Apostles 47-48.)

The "Edith" did arrive in New York in April (80). Neither the logs were produced nor the depositions nor testimony offered of the chief or assistant engineers. The deposition of the second mate was taken in New York on May 15th. The same reluctance regarding the logs was shown by New York proctors as in San Francisco. The appellee's San Francisco proctor now admits that wherever the original logs were he took nothing but copies to the court.

Appelle says of the non-production of the logs *inter alios* (brief 53) that

> "It is quite apparent that the log books could have had no bearing on the issues of fact tried before the court."*

*This concession of the appellee's brief came in reply to a brief in which (pp. 15, 18) we had made the above point.

Mr. McGrann made it perfectly clear that he was seeking the log and engineer's testimony on the fact as to how long the supposedly damaged engine had been stopped before the disaster. We must therefore assume that the engine room logs would have shown that they were stopped long enough to have drifted from pier 42 to pier 32.

The failure to produce the engineer who would have refreshed his memory from the engineer's logs is as significant as the non-production of the log books. The adverse inference from his non-production is not dependent on any demand.

Now as to the bridge log and official log which were asked for during the cross-examination of the master. The master is required "immediately after the occurrence (collision) to cause a statement thereof and of the circumstances under which the same occurred," to be entered in the official log. A penalty is prescribed for not doing so (R. S. 4290, 4292). The universal practice of the sea calls for a full statement in the logs of every occurrence on the ship affecting her navigation or concerning any disaster to which she may be subject.

The captain said in his deposition that in his opinion the cause of the disaster was "getting the line in the wheel" (78). What did he say *in his log* as to the time when he knew the line got in the wheel? Under the theory of appellee's brief (53) that this log would not have conflicted with the captain, we are entitled to assume that he knew it was in the wheel when he was off pier 42, and that he drifted past piers 42, 40, 38, 36 and

34 to within 150 feet of pier 32 without dropping his anchors and before he even tried his engines to see if he could save his ship from the obvious danger.

II.

The "Edith's" Captain Could Have Saved Her During a Long Period After Passing Pier 42 When He Knew the Hawser Was Fouled, by Dropping His Anchors, and Herein of the Further Relevancy of the Logs and the Apparently Purposeful Agreement In an Admitted Untruth, by the "Edith's" Master and Second Mate.

In our last section we have shown that the "Edith's" captain knew off pier 42 that the hawser was caught in the propeller. He also knew that in such a contingency he was in danger and should have dropped his anchors. We now show that if he had done so his vessel would have not been injured.

An illuminating case on the effect on proximate causation of the failure to drop anchors to avoid damage after a proven fault by the tug is

The M. E. Luckenbach, 200 Fed 630.

In that case, the tug, through its fault, collided with a sailing vessel and was compelled to cast off the tow line of a barge. Like the "Edith" (with the captain's delusion as to his engines) the barge was without power and it was her duty to anchor. She failed to do so and grounded and was lost. The tug's fault was held not the proximate cause of the loss of the barge. The court says at p. 637.

"The situation, then, appears to have been this: There was a collision between the schooner and the barge 'Ropes', in which, however, the contact was so slight that no damage was done to either vessel. Nevertheless the captain of the 'Ropes', in the exercise of what is conceded to have been a wise precaution under the circumstances, cast off the hawser connecting the two following barges. It was the obvious duty of the captain of the 'Conner' to anchor at once, even if he had not been signaled by the tug to do so. Eventually he did so, dropping his 3,500-pound port anchor. The evidence shows that the bottom was good for anchorage; and that the anchor put over should have sufficed to hold such a barge, if sufficient chain were put out. Nevertheless, about 15 minutes later the barge was carried by the tide and cast aground on a shoal spot nearly three-quarters of a mile distant, with the 3,200-pound starboard anchor on board. The necessary conclusion is, either that the captain of the barge neglected to anchor until just before grounding, or that, although he did put over one anchor shortly after being cast off, the barge dragged on the anchor and he neglected to give out sufficient chain, or, at all events, to put over his second anchor. In view of the irreconcilable conflict in the testimony, it is very difficult to determine just what happened. Evidently Capt. Printz did not get his anchor down as quickly as he claims. But I believe that the barge dragged her anchor for a considerable part of the distance traversed, due to the action of the tide and swell on a short anchor chain. In either event the neglect on the part of the captain of the barge to take the simple precautions which the situation required constitutes the proximate cause of the stranding. It is not a case of concurrent fault on the part of the tug and the barge. The fault of the barge was not a contributing cause of the damages claimed. The evidence shows that Capt. Printz had ample opportunity, after learning that his barge was adrift, to anchor her. There was nothing in the surrounding circum-

stances to cause any particular excitement on the part of an experienced mariner in the fact that his barge was cast adrift, and he was ordered to anchor. It was a simple, obvious precaution, and called for the exercise of merely ordinary care. If Capt. Printz had exercised ordinary care, the barge would not have grounded.

The libel and petition are dismissed, without costs."

The "Edith's" captain's and mate's excuse for not dropping his anchors was that his vessel was *only 40 feet* off pier 42 when the propeller fouled and that if he had dropped his anchors when so close to the docks she would have been swung against them by wind and tide and been injured.*

Our diagram in our opening brief showed that the "Edith's" drift, in the onsetting wind and tide, must have started from about seven hundred feet off pier 42 to have ended inside pier 32, as described by her captain. *The "Edith's" reply brief admits the correctness of this statement and names 700 feet as the distance the "Edith" backed from the dock's end* (appellee's brief p. 14). It is agreeable to be thus at one with our opponents on a point which we frankly disclosed in our opening brief as logically a necessity in our case.

The significant thing here is that the "Edith's" captain and mate swear circumstantially that the "Edith" reached but 40 feet from pier 44 when her moving out

*Appellee's suggestion that the "Edith's" captain refrained from dropping his anchors in the face of the common danger of the wind, tide and (undisclosed) disabling of the engine, because it would interfere with the *tug's* maneuvers (in ignorance of this danger) is dismissed with the comment that it was the best it could do for the "Edith's" captain.

from the wharves stopped and every force to which she was subject, including her own engines (Apostles p. 36) was thereafter setting her on the wharves. Their testimony is as follows:

"Q. Some projections on the side of the ship were scraping along the dock?

A. Yes, sir, scraping along the dock.

Q. How long did you keep your engines slow ahead at that time?

A. I should say three or four seconds.

Q. Was it what you could characterize as just getting her under way? A. That is all."

"A. Then he kept on towing her until I should judge she was 30 or 40 feet outside of the dock.

Q. Your bow was 30 or 40 feet beyond the end of the dock? A. Yes, sir."*

(Capt. McDonald, p. 35.)

"Q. What happened when your bow was about 30 or 40 feet off the end of the pier?

A. I started slow ahead again, slow ahead, thinking the towboat was going to turn the ship around by the stern."

(pp. 35-36).

"Q. How far was the bow of the 'Edith' distant from the end of the piers then?

A. Somewhere about 30 feet I should judge.

Q. Of the pier ends? A. Yes.

Q. Had you drifted down along the piers?

A. Yes.

Q. Opposite what pier were you when you stopped your engines?

A. Off pier 42 I believe."

(p. 38.)

*It will be noted that it was from pier 44, along which the "Edith" had been scraping, that the 30 or 40 feet are to be measured. Not pier 46 as appellee tries to explain it.

"Q. In the answer it is alleged in the last three lines of page 8 and the beginning of page 9 'that the steamship had been backed out of the slip and into the bay approximately 700 feet when the hawser had been cast off'; is that a correct statement?

A. No, I consider not.

Q. Did any part of your ship ever get 700 feet out into the stream? A. No, I don't think so.

Q. How far did you say your bow was when the second hawser was cast off?

A. About 30 or 40 feet from the end of the dock."

(Captain McDonald, p. 44.)

"Q. Do you know what pier the ship was off when the tug cast off the tow-line?

A. She was off 44 then."

(Second mate Hansen, p. 101.)

"Q. How far were you out at the time the 'Fearess' let go the stern-line?

A. About 30 or 40 feet.

Q. From what? A. From the dock.

Q. What end of the vessel was 30 or 40 feet from the dock. A. The bow.

Q. What did you do when you saw the 'Fearless' had let go the stern-line?

A. Gave the signal to the captain to stop the engines.

Q. Did the captain stop the engines?

A. Yes, sir.

Q. Was it necessary to stop the engines?

A. Yes, because the line was foul."

(Second mate Hansen, pp. 83-84.)

"Q. The claimant's answer states that at the time the line was cast off by the 'Fearless' you were 700 feet away from the pier, is that so?

A. No, sir.

Q. Are you sure of it? A. Yes, sir."

(Second mate Hansen, p. 85.)

These men were 200 feet apart from one another, looking at the dock end from different elevations on the ship, and from different angles and both state the *same exact figure* of distance from the dock which turns out to be untrue and absurdly and impossibly untrue.

We have no difficulty in determining why this extraordinary and untrue concurrence was attained by these two officers. The captain goes on to testify, despite the on setting wind and tide, that he drifted down parallel to the pier head lines and but 30 feet from them and closing in on them (62). He was asked the obvious question why if danger was imminent he did not drop his anchors and he says that he did not do so because the wind and tide would have swung him onto the docks because there was not clear room. He says:

> "Q. Don't you think it would have retarded the ship if you had two anchors down under the forefoot?
>
> A. It would have stopped her if you had got room.
>
> Q. Aside from the room proposition would not two anchors underneath the forefoot have stopped the ship?
>
> A. That seems to be a very material question because——
>
> Q. What is your judgment about it?
>
> A. When we anchor in the stream the anchor is supposed to hold the ship.
>
> Q. What I want to know is, aside from what you have in mind about the swinging of the ship, would not the dropping of both anchors under the forefoot have brought her up in some position?
>
> A. Yes, it would have turned her around.
>
> Q. Now, then, if she had swung you think she would have swung onto the pier do you?
>
> A. Onto the pier, yes, I do.

Q. Would she not have taken the course of the tide?

A. She would probably, after she got clear of the pier.

* * * * * * *

Q. Assuming that you were 30 or 40 feet out from the end of the piers and you have said that your ship would have stopped with two anchors down, and that she would have swung on the tide, and that the tide was parallel to the ends of the piers, don't you see that you would have had clearance off the pier then?

A. No, you are not giving us any allowance for the chain, the chain I would have to give the ship to pick her up."

(pp. 63-64.)

All this danger from swinging at anchor, rested on the theory that the "Edith's" line of drift was but 40 feet off the pier-head lines. With the drift commencing 700 feet off, the distance now agreed on by both parties, absolutely no excuse remains for not dropping the "Edith's" anchors as soon as the captain knew the line had fouled in the propeller. As we show in the diagram in our opening brief, he could have anchored his ship safely long before he reached pier head 32 against which he finally brought up.

Did the captain say *in his log* that the vessel was 700 feet from the dock when she began to drift and is this the reason why appellee's proctor admits the captain's and mate's figures are wrong by the difference between an exactly untrue 40 feet for each and the real 700 feet? Without any suggestions that this is the reason for its non-production, it may well be that the "Edith's" proctor, having invoked a high standard, admits the 700 feet

rather than gainsay advantage from the failure of Eastern counsel to refresh the captain's memory from the log or offer it in evidence.

However this may be, the purposeful choice of 40 feet as the distance from the dock because it excused the failure of the "Edith's" captain to drop the anchors is very persuasive evidence that at the true distance of seven hundred feet the failure to drop them was entirely inexcusable.

We submit that it is clearly proven that for a considerable time after the tug dropped its hawser off pier 44 and until it had been hauled in so that the end fouled in the propeller, the ship's engines continued to turn ahead. That the captain was told the line had fouled and thereafter stopped his engines. That he was then off pier 42 and fully realized his danger. That his anchors were ready for dropping and would have saved his ship from any injury if dropped anywhere over a large part of his drift. That he did not drop them and that he assigned an admittedly untruthful reason for not doing so, and therefore that the "Edith" is responsible for the injury to her.

We submit further that the "Edith's" captain erred in not telling the tug's captain that he had resigned control to him so he could have ordered the anchors dropped as he undoubtedly would have if he had been told, at the same time, of the supposed condition of the "Edith's" engines.

III.

The "Edith" Could Have Reversed Her Engines From Pier 42 on and Have Saved Herself—and Herein of the Further Relevancy of the Logs.

The "Edith's" mate and the tug's captain agree that the tow line was dropped when the "Edith" was off pier 44 (101, 288). The "Edith's" captain says that his engines continued to go *ahead* for some time till the line fouled in his propeller, and that he thereafter stopped his engines, and began to drift. This drifting, after the known fouling of the line, began at pier 42. In view of the evidence grouped in the first chapter of this brief we must assume these facts to be true. We here show that if he had tried his engines at any point up to 300 feet of pier 32 he would have cleared that dock.

The significant thing in this connection is that both the "Edith's" captain and mate agree that during this period after the line was dropped the "Edith's" engines were *going ahead* (60, 98) and hence throwing the water behind the vessel from which the tow line stretched at full length on the water. That is to say, that as long as any considerable part of the line lay in the water, it would be driven *away from* the ship by the backward moving waters. It is hence not surprising that we find that it was the *eye on the end* of the hawser that fouled. Had the propeller been reversing and sucking the waters of the bay toward the ship, the result would probably have been different.

Proctors in argument suggest that the line may have fouled at some other point than the end. The answer

to this is that the second mate who stood over it as it was hauled in, and must have known if it had fouled before then, says that it was the end (Hansen, 86, 100).

Since all this occurred before the ship had drifted past pier 42, it becomes immaterial how long anybody thought it would take to haul in the tow line. The "Edith's" second mate had three or four men to help him (89), and the tug's captain says it would take 5 minutes for two men to haul it in. Somebody else gives a guess of six minutes. Somebody else says there was a tide of from two to three miles. These are guesses as to time and rate and have little value against the statement of the captain that the process was finished and his engines stopped at a certain and definite place, viz: pier 42.

We submit that it was inexcusable error, causing the injury to the vessel, not to have at least tried his engines out somewhere between pier head 42 and pier head say 34, and determined whether they were, in fact, incapacitated. His failure even to ask the chief engineer whether he found any trouble with his engines (68) is a minor but important element in this negligence. That had the captain tried to use his engines at any place up to 300 feet of pier 32 he would have cleared her is apparent from the fact that starting them at 200 feet from the pier he cleared about two-thirds of her 327 foot length and he had little over 100 feet more to go. The testimony on this is as follows:

> "Q. When this last hawser parted how far were you from pier 32?
>
> A. We were probably 150 or 200 feet.
>
> * * * * * * *

Q. At the time that the third hawser parted how was your stern with reference to the end of pier 32, was it inside of it, with reference to a line tending to cross the end of pier 32?

A. It would be pretty nearly square with it.

Q. So that the entire ship would be inside the end of pier 32?

A. Inside the dock, yes, inside of pier 32.

* * * * * * *

Q. There was no line between you and the tug?

A. No.

Q. What did you do when you got that report?

A. I went full speed astern, fragments of the seven-inch line was fast to the wheel.

Q. What happened then?

A. The ship went astern but not sufficient to clear the dock, pier 32.

Q. And you came into collision?

A. With the end of the dock.

Q. What part of the dock hit her?

A. The corner of the dock.

Q. Whereabouts did it hit on the 'Edith'?

A. Probably about one-third from the bow.

Q. One-third of the length aft? A. Yes."

(Apostles pp. 39, 40, 41.)

Did the captain in his account in the log of the circumstances leading to the collision with the dock confess his error in not trying out his engines? It may well have appeared there, though his testimony to the admittedly false 40 feet distance makes us doubt it. But should we have been denied the right, universally conceded in admiralty cases, of examining *for ourselves* the official log and the mate on the bridge who made the bridge log entries or else to see the bridge log and determine from one or another source what the records of the ship had to say about this disputed point.

IV.

The Line of the Tug Was Unloosened When the "Edith's" Engines Were Stopped—and Herein of the Further Relevancy of the Testimony of the Missing First Mate and Engineer and of Their Logs.

The captain of the tug says that the "Edith's" engines reversed and helped back her till she was 700 feet from pier 44, when he saw her propeller stop, and assumed that she was going no further astern (312, 313) and desired his presence at her bow. He unloosened his line (under the eye and control of the "Edith's" mate) and finally it was dropped in the water.

This assumption of the tug's captain is, in part, justified or not justified by a consideration of the point where the "Edith's" backing stopped and the length of time the engines were stopped between their going astern and turning ahead which both the "Edith's" captain and mate admit they were doing when the end fouled.

The "Edith's" captain says that he started to back slowly and then seeing the vessel was going astern too fast sent his engines ahead to stop her and then stopped his engines *before his vessel left the wharf, and that the tug then pulled her 40 feet beyond the dock,* without assistance from the "Edith" (58, 59) where the tug stopped towing and dropped the line. The two captains differ in two points (1) as to the "Edith's" distance from the docks when the towing stopped, and (2) as to whether the "Edith" continued reversing till she was 700 feet from the dock.

In view of the admission of the "Edith's" captain's untruthfulness about the 40 feet distance, we may be entitled to assume the same regarding his story as to the engines. However, is it not potent that the "Edith's" engineer could have told us whether he started reversing, after the first order to go ahead on his engines to check the backing, and that he could have refreshed his memory from his log? We submit that we are entitled to assume that the failure to produce either the engineer or his log is a confession that the allegation of our answer (Apostles 21) and the statement of the tug's captain is true, namely, that the "Edith" did continue to reverse till she was 700 feet out into the stream, and that her stopping indicated that this was as far as she intended to go.

The mate on the bridge, his bridge log, the official log, the engineer and the engine room log each had or should have had something to offer on these disputed questions. The "Edith" with the burden of proof on her, produces none of them and offers no explanation.

It will be remembered that the "Edith's" captain, who, it is undisputed, had command of the maneuver at any rate till the line was dropped, had provided no code of signals between the vessels and hence left to the discretion of the tug the interpretation of the "Edith's" intended maneuvers (appellant's opening brief, pp. 9, 10). It was not necessary for the tug to indicate by whistle that it had cast off its line when it did so under the eye of the mate only 30 fathoms away. The "Edith's" captain tells us that he expected to re-

ceive and give his information through the mate and not by whistle communication (56).

It is submitted that the libellant has not sustained its burden of proof, either that the "Fearless" was negligent in casting off its line when it saw the propeller stop 2100 feet from the place of collision, or that this act was the proximate cause of the loss where in the intervening two-fifths of a mile the "Edith" neither dropped her anchors nor reversed her engines, nor gave to any one else the knowledge of a necessity to do either of these things, or the power to compel her to do them.

V.

Appellee's "Out of the Record" Statements and Subsequent Admission That the Log Books Were Not in Fact Produced at the Trial Below. Its Failure to Introduce Them in the Trial de Novo in This Court.

At the hearing of the appeal, proctor for appellee interrupted appellant's argument to suggest that although it did not appear in the record, he had, in fact, in the lower court at the trial shown *the logs* or copies of them to the opposing counsel and that opposing counsel had indicated to him he had no interest in them. Appellee's brief (p. 52) says that the court may infer from the absence of any comment in the record that "the *books* were in fact produced and examined by appellant's counsel."

Appellee, in a letter to the court, now modifies this statement, and says that it did not have the log books at the trial in the lower court at all, but that at most it

had copies of them which it *thinks* it showed to opposing counsel who tried the case in the lower court, but that it is willing to accept his statement as to whether or not he saw the log books or copies.

In response to appellee's out of the record statements at the hearing on the appeal and in the correspondence which this method of procedure necessitated, two telegrams were sent to Mr. Campbell, who tried the case in the court below. The telegrams and their replies are as follows:

"San Francisco, October 26, 1918.
Ira A. Campbell,
Washington, D. C.
Greetings: In Bull Fearless Case Griffiths and I made strong point logs not produced though demanded in New York depositions. Sutro intimates you declined examination of log which was in court room. This inconceivable to us. Gray and Griffiths both state did not see logs of 'Edith'. Please wire me statement which I can use in answer to Sutro if he makes oral statement at argument. I will not use it unless he intimates in court that his logs were in fact inspected or inspection was declined.
William Denman."

"Washington DC 1247P 29 1918 Oct 29 AM 10 04
William Denman
Merchants Exchange San Francisco Calif.
I have never seen log book of steamer Edith whose owner is suing shipowners Merchants Tugboat Company owner of tug Fearless for damages arising out of collision with pier in San Francisco harbor stop if log was in possession of counsel for Edith at time of trial before Judge Dooling it was never disclosed to me and I knew nothing of it notwithstanding previous demand had been made for its presentation.
Ira C. Campbell."

"San Francisco, November 20, 1918.
Ira A. Campbell,
Washington, D. C.

Bull Fearless Case. Referring Mr. Denman's wire to you and your reply regarding logs Mr. Sutro now says his recollection is that he showed you not the original logs but copies of the logs at the trial, but that you evidenced no interest in them. Neither Captain Gray nor myself recall having seen either logs or copies or having heard from the other side of either at the trial. Please wire me your recollection immediately.

Farnum P. Griffiths."

"1918 Nov 21 AM 8 48
AH Washington DC 101 5A 21
Farnham P. Griffiths
1107 Merchants Exchange Bldg San Francisco Calif

What I said in my former wire to Denman about not having seen Ediths logs also applies to alleged copies thereof for I have never seen originals nor copies stop Mr. Sutro is mistaken in his recollection that he showed me copies of logs

Ira A. Campbell."

We may therefore assume it as a fact that the original logs were neither in the court room for production, nor their production waived. That is to say, the court is now relieved of the difficult task of inferring non-production, from the failure of the record to show production.

It is hard to see how an admiralty lawyer could for a moment consider a want of interest in *copies* as a waiver of production of the original log books. The entries in the bridge logs are made by different persons in the different watches appearing on each page and the different handwritings are identified by the signa-

tures at the bottom of the page. If, for instance, the entries of the bridge log regarding the dropping of the hawser and the vessel's distance from pier 44 were made by the captain they would have a different evidentiary value from those of some other officer's. The failure to note an important matter in these entries by the captain would have a different value from absence of comment by the third mate who had no responsibility for the maneuver.

This is presuming the entries were true. But will anyone contend that the two officers, who testified so insistently and untruly that their vessel never proceeded more than 40 feet beyond pier 44, when their proctor admits that she was towed 700 feet, would hesitate to alter a log entry from 700 feet to 40 feet?

Would they hesitate to erase an entry to the effect that they knew beforehand that the tow line was to be cast off in time to tell the tug captain it did not fit into their plans and prevent the casting off,—such an entry as, that the second mate saw the deck hand start to unloosen the end?

Would they hesitate to alter an engine room log entry showing that the "Edith", in fact, did back out from the dock for a long distance and then did stop her engines for an appreciable time during which the tug may have dropped its lines in proper belief that it was as far as the "Edith" desired to go?

None of this would be shown in the copies, though quite likely discoverable in the originals.

The appeal is a trial *de novo*. Appellee was willing to go outside the record as to matters it thought had

transpired at the trial below. *Why did it not produce the original log books at the hearing in the upper court or ask time within which to do so?* This it could have done without any discussion as to its propriety.

Appellee argumentatively suggests that the books would have thrown no light on the situation, but may it not be as mistaken in this inference it suggests the court should make, as it was regarding the inference that the books themselves were in the courtroom at the trial? Both are, of course, proper argumentative points on the record, but is the first inference any more warranted by the real facts than the second now turns out to be?

We submit that the log books, as well as the testimony of those who made the entries in them, are shown by the preceding chapters of this brief to be necessary for a full disclosure of the acts and intentions of the "Edith".

VI.

Appellee Has Not Explained the Failure to Produce the First Mate, His Bridge Log, the Official Log, the Man at the Wheel, the Engineer, the Assistant Engineer, the Engine Room Log and Scratch Logs, and Any of Her Seven or Eight Sailors Handling the Tow Lines, All of Whom Were Eye-Witnesses to Disputed Facts.

To sustain her burden of proof, the "Edith" attempted to show amongst other things (1) that she was but 40 feet from the dock when the tow line was dropped; (2) that she had not been reversing after

leaving the dock and up to the time she was 700 feet off, and therefore that there was no stopping of her propeller as an indication to the tug that she was far enough off the docks; (3) that the propeller was going ahead when the line was dropped; (4) but stopped as soon as it was dropped; (5) that a very short time elapsed from the time the tow line was hauled in till she collided with the dock during which anything could have been done; (6) that his line of drift 40 feet off the docks was too close to permit him to anchor; (7) that her captain was warranted in not trying to use his engine to save himself in face of a known danger.

On all these points there was a disagreement which we believe on the evidence actually offered should be resolved against the libelant. It is apparent, however, that the first mate who was on the bow of the vessel, the man at the wheel, the sailors who handled the lines, the engineer, the assistant engineer and the four logs each had some evidence to give in one or another of the disputed points. They were not produced and their non-production is not explained.

It was not necessary to demand the logs to give us the inference from their non-production. The men who made the entries were not produced, and the adverse inference from their non-production is not dependent on any demand that they be put on the stand. They would have used the logs to refresh their memories and the demand for examination of the entries would be made on cross-examination as in the case of the captain.

But the logs were in fact properly demanded. A deposition is a part of the trial or becomes one as soon

as introduced in evidence. The logs of a ship which are kept under the control of a vessel's captain and signed by him are properly demanded on his cross-examination.

The libelant, by its own act placed in the record the demand of opposing counsel for the log's production. It was as much a demand *at the trial* as the preceding questions and answers of the cross-examination properly leading up to the demand were evidence *at the trial.*

Counsel speaks of the depositions as having been "sealed" when sent to the court. We are not able to see the relevancy of this suggestion. Libelant's proctor who examined the captain in the deposition heard the demand, and the proctor at the hearing presumably read the depositions before he offered them in evidence and made the demand a part of the trial.

The cases cited by counsel are not relevant nor are the rules referred to. Both concern the right to an *inspection* of documents *prior to* the trial, analogous to the right of discovery in equity. They have nothing to do with the demand to produce a log *at the trial.*

Admiralty Rules 35 and 36 of the Supreme Court do not refer in any way to the production of documents. Proctor must have had in mind rules 35 and 36 of the District Court. These are as follows:

> 35. "Discovery of documents before trial.
>
> After joinder of issue, and before trial, any party may apply to the court for an order directing any other party, his agent or representative, to make discovery, on oath, of any documents which are, or have been, in his possession or power, relating to any matter or question in issue. And the court may

order the production, by any party, his agent or representative, on oath, of such of the documents in his possession or power relating to any matter in question in the cause as the court shall think right, and the court may deal with such documents, when produced, in such manner as shall appear just."

36. "Notice of production, before trial, of documents referred to in pleadings or affidavits.

Any party shall be entitled at any time, by notice in writing, to require any other party in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his proctor, and to permit copies thereof to be taken; and any party not complying with such notice within five days, or such further time as may be allowed by consent or by order of the court, shall not be at liberty afterwards to put such document in evidence on his behalf, unless he shall satisfy the court that he had some reason which the court shall deem sufficient for not complying with such notice, in which case the court may allow the document to be put in evidence on such terms as it shall think fit."

By their very title, these rules apply to the production or inspection *before* trial.

In *The Washtenaw,* 163 Fed. 372, the court merely considers its power to give the equitable relief of discovery *before* trial, and the same is true of *Havemeyers etc. Co. v. Compania Transatlantic Espanola,* 43 Fed. 90.

VII.

Summary of Tug's Answers to Various Arguments of Appellee.

Not "up to" tug to assume control. We have before shown that the "Edith's" captain could not claim he

had transferred the dominion of the maneuver because he did not convey the information as to his delusion that his engines could not be used to assist, and give the tug the option to insist that the anchors be dropped, or to take another stern line and pull the "Edith" further out, or to try out the engines and see whether the "Edith" could not herself back out of danger as she in fact could.

Tug blameless in negotiations for the new tow line from the "Edith's" bow. However we may interpret the conflict of testimony as to the negotiations for the third tow line, we have shown that every act of the tug's captain was done in ignorance of the fact that the "Edith's" captain did not intend to assist with his engines which at any time, till the very end, could have backed her into safety. This is apparent from the fact that they did back her *two-thirds her length after the last line had been made fast* (which took considerable time) *and had parted* and that she cleared all but one remaining one hundred odd feet of her length and proceeded alone and unaided to Hunter's Point.

Can it be thought possible that the tug captain would not have instructed the "Edith's" captain to have tried to back his engines long before the "Edith" was within 200 feet of pier 32 if he had known that the command of the "Edith" had in fact been transferred to him? And yet if the attempt to back the "Edith" had been made at any time before she was within 300 feet of the pier, she would have gone clear. In any event if the tug's captain was to be made responsible for any delay or misunderstanding in the negotiations for the

third line, he should have had intelligent freedom of choice.

The five dollars additional charge did not prevent the passing up of the hawser. The office manager of the tow boat company who was not an eye witness said:

> "Q. Now, captain, if the 'Edith' had engaged for the tug's lines, or if she had an understanding with you that in case she wanted them she was to have them, would that 12-inch hawser have been passed up to the 'Edith'? A. Yes, sir." (269-270.)

And, again:

> "The only reason it was not passed out is that it was not engaged for." (259.)

This at best is mere after-opinion of an absent party, but it clearly means that if the contract had been definitely made, the tug's captain might have carried it out on the demand of the "Edith's" captain even if he did not believe it was the best thing to do.

Can it be supposed that the mere question of $5.00 would have influenced the tug's captain if he had been told that the "Edith's" engines were dead, and that she was a mere helpless barge? In viewing this case it must be always borne in mind that the "Edith" knew she would not use her engines and that the tug's captain did not.

The "Edith's" captain acquiesced in the tug's going to the "Edith's" bow and taking a line there. After the tow line was dropped the tug was at all times within hailing distance of the "Edith". Her captain, knowing he did not intend to use her engines, permitted the tug to steam along her starboard side to her bow, negotiate

there for a time, gave out the line, and *motioned to the tug to pull the "Edith's" head to starboard* (66). He knew that the tug was entitled to believe his engines were in good condition because he had not told the tug's captain to the contrary. If the engines had been working the distaster would not have happened. If the "Edith's" captain had ordered the tug to take a tow line at the stern he would have easily hauled her back *lengthwise* and the disaster would not have occurred. Instead, he acquiesced in the tug attempting a maneuver dangerous because of the unknown crippling of the engines,—the maneuver which compelled the tug to travel the greatest distance and to exert the greatest strain on the hawser, i. e., at right angles to her length, while it would move the "Edith" the minimum distance from pier 32.

The tug's willingness to attempt to tow from the bow of the steamer after dropping the line is no excuse for not dropping anchors. The "Edith" should have dropped her anchors or should have told the tug captain that her propeller was disabled (or conclusively thought to be) and left it to the tug to determine whether the anchors should be dropped. As she did neither, her acquiescence in the tug's movement to the bow and giving the tug a tow line is an acceptance of any result which might have been prevented if the anchors had been dropped or if the tug, knowing the real danger, had been permitted to use that or some other method of extricating the "Edith" from her position.

Absurd to say that "Edith's" captain should have refrained from dropping her anchors because it would

interfere with tug's proposed maneuver. The tug did not know of the prime necessity for dropping anchors, i. e., the concealed delusion as to the engines. The "Edith" is estopped to say that she yielded her right to drop anchors to the tug's maneuver, unless she told the tug of the new and dangerous condition affecting the probability of success.

VIII.

The "Edith's" Faults Are Clearly Shown and This Court Should Decide the Case on Its Merits.

Appellee's brief cites certain cases where the court had refused to disturb the decree of the court below, but they none of them present the following features distinguishing this case:

(1) In none has the captain when under oath said that the proximate cause was a particular act as her "getting the line in the wheel" (78) while not a word concerning fouled propeller or caught tow line appears in the libel (4 to 12).

(2) In no one of them did the successful party's own depositions clearly prove that his vessel was in the wrong as is shown by those of the "Edith's" captain and second mate in this case. As it stands, it clearly appears that if everything in the oral testimony be taken as true, nevertheless the appellee's depositions show the "Edith" in unexcusable fault and that her fault is the proximate cause of the collision.

(3) In no one of them has the successful vessel failed to produce the ship's official log, her first mate,

who was on the forecastle head, the log he kept, the man at the wheel, the engineer and assistant, the engine room logs and any of the eight or nine sailors handling the lines, and rested its case on but two depositions in which appears such a purposeful coincidence of testimony as the two statements of a 40 foot distance from the dock when their own proctor admits it to have been 700 feet.

(4) In no one of them did the vessel drift for 1800 feet in plain sight of her danger and then collide with the dock in broad daylight with her anchors at the bow and her engines, though in good condition, not used till the last 200 feet of the drift.

(5) In no one of them did the captain of the successful vessel in the suit confess to a delusion as to his engines which converted his vessel from a powered steamer into a barge, which fact he concealed from the tug he claims was in control and which he was to assist.

(6) In no one of them did the lower court fail to follow this court's requirement to render an opinion to show what the line of reasoning was by which it reached the conclusion which this court is asked to accept.

Taking up the lower court's findings, one by one:

> "1. The master of the 'Fearless' was at fault in not consulting with the master of the 'Edith' as to the maneuvers intended by him before he undertook to execute them."

We say that the deposition of the "Edith's" captain and mate show that her captain was in command at the start of the maneuver; that he established no method

of communication with the tug, and that he is responsible if faulty planning was the cause of its failure.

> "2. He was also at fault in casting off the line without warning and while the 'Edith's' wheels were turning."

We say that the depositions of the "Edith's" captain shows he contemplated that the second mate at the hawser end should be the eye of the ship and that the unloosening of the hawser under the mate's eye without protest was an acquiescence in subsequently dropping it, and that permitting the tug to come to the bow and giving it a line there was further acquiescence; and that the failure to tell the tug that the propeller was fouled and that the "Edith's" captain would not attempt to start it estops the "Edith" from claiming that the fault, if any, in dropping the line transferred the dominion from the steamer to the tug.

> "3. To these faults the accident was due."*

We say that the depositions of the captain and mate show conclusively (corroborated by the failure to produce logs or other witnesses) that the so-called faults were not the proximate cause of the loss but that the cause of the loss was the failure to drop anchors off pier 42 (1800 feet from pier 32) when the captain thought his propeller fouled and concluded not to use it, but concealed that fact from the tug; or, that the cause of the loss was the "Edith's" failure to try her engines and back out of the danger, as she could have done up to within 300 feet of pier 32; that the

*We have fully discussed contributory negligence and division of damages in our opening brief at page 43.

"Edith" is estopped to say the tug caused the loss as she did not advise the tug that she had passed the responsibility up to the tug with full information that she was no longer a powered boat but was converted into a barge.

> "4. The 'Fearless' should have passed to the 'Edith', after letting go of her and while she was drifting, a line of sufficient strength to hold her and should have been prepared to do so. This was not done."

We say that this court must examine the testimony on this point as the District Court did not find that the discussions and delay (if any) over the third hawser was causative of the loss. The tug is not to blame for not passing up the heavy line if it did not think it practicable at the time it was requested. All her acts must be viewed with reference to her ignorance of the (mental) disability of the steamer's engines and her belief that the steamer could back herself into safety.

> "5. The 'Edith' was not at fault for not dropping her anchor, as she was entitled to believe that the 'Fearless' would care for her properly."

We have shown the error in this finding in the answers to the other four. All the testimony we have from the "Edith" shows that the "Edith" is estopped to say that command had been passed "up to the tug", because she did not tell the tug she could not use her engines and also because she acquiesced in the tug's coming to tow her round from the bow, a maneuver possible of success only if the "Edith's" engines helped. In the absence of notice of the fouled propeller, the tug must be exonerated, for it is clear that its conduct

would have been entirely different had it known the facts, or that its function had been converted from an "assist" into a "command".

Prayer.

WHEREFORE, we pray that the decree of the District Court be reversed and that the "Edith" be declared solely in fault and the libel dismissed.

Dated, San Francisco,
November 27, 1918.

Respectfully submitted,

WILLIAM DENMAN,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant.